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Leave it to the experts: a call for competition expert lay judges in private enforcement
of competition law
Competition law

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Abstract

This paper focuses on the procedural instrument of competition expert lay judges to ease damages calculations and private actions for damages for the violation of competition law in general. To this end, the paper analyses various forms of expert lay participation already existent in Europe. It concentrates especially on commercial and intellectual property proceedings but also delves into the few existing examples of competition expert lay judges for private enforcement of competition law. It assesses their transferability for competition damages proceedings and attempts to test EU and national competition as well as procedural law boundaries more generally. The Paper works out common grounds, advantages and disadvantages, as well as best practices. It concludes with first proposals for including competition expert lay judges in private enforcement of competition law.

Keywords: Competition law, private enforcement, damages, lay judges, expert lay judges, economics, specialisation, commercial court

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I. Introduction

The 2014 Damages Directive² led to an increase in private damages actions for competition law violations across the EU.³ Unfortunately, these actions have less often resulted in an award of damages. Instead, courts only handed down interlocutory judgments affirming liability without quantifying damages or had to dismiss actions altogether.⁴ This trend results from the considerable difficulty of quantifying cartel damages. According to recital 45 of the Damages Directive, “[t]he quantification of harm in competition law cases can [...] constitute a substantial barrier preventing effective claims for compensation.” An analysis often entails reconstructing entire market structures, and “prices, sales volumes, and profit margins depend on a range of factors and complex, often strategic interactions between market participants that are not easily estimated”.⁵

For damages calculation, including a calculation of a possible pass-on of damages, parties depend on complex and lengthy economic calculations provided by costly economic experts. Often, there are several contradictory party expert opinions and court appointed expert opinions, which further drive-up procedural costs and duration.⁶ Particularly the costs incurred for the engagement of economic experts could exceed the actual damages in case of small claims and is, therefore, prohibitive.⁷ Accordingly, the Directive itself contains several alleviating measures, such as the possibility of damages estimation⁸, and is accompanied by a Practical Guide on quantifying harm⁹. Furthermore, practice and academia have suggested several substantive and procedural solutions to facilitate damages actions and damages calculations across the EU: presumptions of harm¹⁰, various forms of collective redress¹¹, litigation funding¹² or involvement of competition authorities in the calculation of the damages¹³.

This paper focuses on a further procedural instrument that could be added to the toolbox, and that could ease damages calculations and damages actions in general: the use of competition expert lay judges. This paper uses the terminology of lay judges for any kind of lay participation on the bench, where the layperson either has no (full) legal training in order to be a professional judge or judging is not the primary source of income, and thus contrasts lay judges with professional judges who are full-time judges, where court work is their primary source of income, and who have obtained a corresponding full legal education.¹⁴ This paper does not concern the participation of laypersons in the general public’s sense. Instead, the focus will be on so-called expert lay judges.

² Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Damages Directive).

³ See Jean-François Laborde, *Cartel damages actions in Europe: How courts have assessed cartel overcharges: 2021 edition* (5th edn) [2021] *Concurrences* 232, 235.

⁴ *ibid* 236.

⁵ European Commission, ‘Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the TFEU (SWD (2013) 205)’ par 16 <https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf> accessed 01 Mai 2022.

⁶ See Provincial Court of Barcelona, 10 January 2020, 1964/2018.

⁷ Tilman Makatsch and Babette Kacholdt, ‘Estimation of cartel damages in competition litigation in Germany: 15 per cent as the new standard?’ (2021) 14 *GCLR* 12, 15.

⁸ See Art. 17(1) Damages Directive.

⁹ European Commission (n 5).

¹⁰ See Lena Hornkohl, ‘The Presumption of Harm in EU Private Enforcement of Competition Law – Effectiveness vs Overenforcement’ [2021] *ECLIC* 29 et seq.

¹¹ See Eda Şahin, *Collective Redress and EU Competition Law* (1st edn Routledge 2018).

¹² See Inge Scherer, ‘Gewerbliche Prozessfinanzierung’ (2020) 3 *VuR* 83 et seq.

¹³ See Justus Haucap and Ulrich Heimeshoff, ‘Kartellschadensermittlung im Spannungsfeld zwischen Präzision und Effizienz: Prinzipielle Anforderungen aus ökonomischer Perspektive und praktische Handlungsoptionen’ [2022] *ZWeR* 80, 100.

¹⁴ The paper does not concern lay participation in the form of a jury.

In most Member States, the ordinary civil courts handle cartel damages actions with panels consisting of professional judges. While those judges sometimes have acquired a competition focus over time, the emphasis on competition expertise, particularly economic expertise, on the judiciary panel could be stressed even further by including competition expert lay judges on the bench. Those lay judges could be economists or come from the business sector and are sufficiently familiar with damages calculation.

The paper is based on and aims to test the following hypothesis: the participation of competition expert laypersons on the bench, serving instead or next to professional judges, advances the understanding of the economic realities of damages calculation of the judiciary and thus leads to an improved damages calculation and overall procedural efficiencies. To this end, the paper analyses various forms of expert lay participation already existing in Europe, especially in commercial and intellectual property matters but also the few examples of competition expert lay judges for private competition law damages actions.¹⁵ However, this paper does not include an empirical study on the usage of lay judges¹⁶ but is based primarily on systematic legal policy analysis. The paper compares different approaches for lay participation in civil justice across Europe and beyond competition damages proceedings, assesses their transferability for competition damages proceedings, and attempts to test EU and national competition and procedural law boundaries more generally. It tries to work out common ground, advantages and disadvantages as well as best practices. It concludes with a practical proposal for including competition expert lay judges in private enforcement of competition law.

II. Taking stock: lay judges in civil justice across Europe

This section analyses the general state of play regarding expert lay participation in civil justice across Europe, focusing on commercial and intellectual property proceedings, which have some similarities with private competition litigation. Finally, the section will shed light on existing concepts of lay participation in private damages actions for competition law violations. Thus, it will serve as general background and will provide models for a possible extension of the concept of expert lay judges.

1. Examples of lay participation in civil justice

Involving lay judges on the bench is a well-known concept, both in the EU but also in other European states. Generally, lay participation in civil procedure can take different forms and concern different subject matters of civil justice. Layperson involvement can consist of a single lay judge, a panel of lay judges and mixed courts consisting of both lay and professional judges.¹⁷ While general lay participation in criminal matters exists across the board¹⁸, lay participation in civil matters is more limited. Only the so-called “justices of the peace” known in, for example, in Italy¹⁹, Luxembourg²⁰ and Spain²¹, are single lay judges of the first instance in civil matters competent for general but minor

¹⁵ Other forms of judicial specialisation, such as concentration or special chambers for competition matters, will also be briefly addressed, as they are thematically related to the question of further expertise on the bench in cartel damages cases. However, a complete analysis is beyond the scope of this paper.

¹⁶ See Stefan Machura, *Civil Justice: Lay Judges in the EU Countries*, *Oñati Socio-legal Series* [online] (2016) 6 235.

¹⁷ *ibid* 241.

¹⁸ See Marijke Malsch (ed), *Democracy in the Courts : lay participation in European criminal justice systems* (Ashgate 2009); Gerald Kohl and Ilse Reiter-Zatloukal (eds) *Laien in der Gerichtsbarkeit* (Verlag Österreich 2019); Sanja K Ivkovic, Shari S Diamond, Valerie P Hans and Nancy S Marder (eds), *Juries, Lay Judges and Mixed Courts – A Global Perspective* (Cambridge University Press 2021).

¹⁹ Art. 7 Code of Civil Procedure Italy (Codice di procedura civile).

²⁰ Art. 1 Code of Civil Procedure Luxembourg (Code de procedure civile).

²¹ Art. 100 Law 6/1985 of 1 July 1985 on the Judiciary Spain (Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial).

civil legal disputes.²² The above-mentioned general distinction between general and expert lay judges should also be pointed out here; the latter is the subject of the following analysis.

Contrary to criminal procedures, lay judges are used in specialised courts or special divisions of ordinary civil courts. In that sense, many European countries foresee lay judges in labour law proceedings.²³ Lay judge participation in labour law is certainly the most extensive form of judiciary lay participation in Europe, as the concept is known, *inter alia*, in Austria²⁴, Belgium²⁵, Finland²⁶, France²⁷ and Germany²⁸. Labour courts usually consist of an even number of employer and employee representatives as lay judges who are appointed for a specific period of time. In labour law, other reasons are also given for the use of lay judges, such as an increased acceptance of the decision through the involvement of peers.²⁹ However, the main reason given for their involvement is their workplace knowledge and experience from the daily professional and social environment that lay labour judges bring to the bench.³⁰

In some Member States, such as Germany³¹ and France³², there are special courts or chambers for agricultural disputes in which expert lay judges participate in the decision-making process.³³ These courts are usually competent for disputes concerning agricultural leases or tenancy.³⁴ The lay judges are appointed for a specific period. They usually consist of an even number of landlords and farmers appointed based on a proposal by the representative professional organisation or elected by their peers.³⁵ The main reason for including those lay judges in agricultural disputes is also their specialist knowledge. Agricultural land disputes have a strong economic orientation, and the legislator wanted to make the courts more independent from expert opinions.³⁶ Therefore, the panels themselves should include persons who have acquired the necessary expertise to contribute to independent bases for judgements through professional experience and their familiarity with the conditions of agriculture.³⁷

In several branches of the civil judiciary, technical questions play an important role. Above all, intellectual property proceedings, especially patent infringement and invalidity proceedings, usually revolve around technical questions or even concerns the novelty of a specific technical feature. In many systems, so-called technical judges sit alongside professional judges, *i.e.*, legally qualified judges, on panels in patent courts that deal with invalidity and infringement proceedings. Even though the details of the appointments of technical judges to the judicial benches and their tasks vary in detail,

²² In Italy, for example, the ‘*giudici di pace*’ are *inter alia* competent for disputes not exceeding a certain kind of a value, for example, € 5000 for disputes relating to movable property, Art. 7 Code of Civil Procedure Italy (Codice di procedura civile).

²³ See Sue Corby, Peter Burgess and Armin Höland, ‘Employees as judges in European Labour courts: A conflict of interests?’ (2021) *Eur J Ind Relat* 27 (3) 231 et seq.; Peter Burgess, Sue Corby, Armin Höland, Hélène Michel, Laurent Willemez, Christina Buchwald and Elisabeth Krausbeck, ‘The Roles, Resources and Competencies of Employee Lay Judges: a cross-national study of Germany, France and Great Britain’ (2017) Working Paper 151 <https://www.boeckler.de/pdf/p_fofoe_WP_051_2017.pdf> accessed 01 May 2022.

²⁴ §§ 10, 11 Labour and Social Court Act Austria (Arbeits- und Sozialgerichtsgesetz).

²⁵ Art. 81 Belgian Judicial Code (Gerechtigd Wetboek, Code Judiciaire).

²⁶ § 8 Act on proceedings before the Labour Court Finland (laki oikeudenkäynnistä työtuomioistuimessa).

²⁷ Art. L-1421-1 Labour Law France (Code du travail).

²⁸ § 6 Labour Court Act Germany (Arbeitsgerichtsgesetz).

²⁹ See Malte Creutzfeldt, ‘Ehrenamtliche Richter in der Arbeitsgerichtsbarkeit’ [1995] *AUA* 263 et seq.

³⁰ Burgess/Corby/Höland/Michel/Willemez/Buchwald/Krausbeck (n 23) 79.

³¹ §§ 2, 3 Agricultural Procedures Act Germany (Landwirtschaftsverfahrensgesetz).

³² Art. L492-1 Rural and Maritime Fishing Code France (Code rural et de la pêche maritime).

³³ See Mechthild Baumann, Hasso Lieber, ‘Ehrenamtliche Richter in Landwirtschaftsverfahren’ [2012] *Richter ohne Robe* 6; Ute Gerlach-Worch, ‘Ehrenamtliche Landwirtschaftsrichter: Mitwirkung auf Augenhöhe durch Sachkunde’ [2016] *Richter ohne Robe* 7.

³⁴ See § 1 Agricultural Procedures Act Germany (Landwirtschaftsverfahrensgesetz).

³⁵ See France Art. L492-2 Rural and Maritime Fishing Code France (Code rural et de la pêche maritime).

³⁶ See BT-Drs. I/3819 16, 19; BT-Drs. I/4429 1.

³⁷ See German Constitutional Court, 3 June 1980, 1 BvL 114/78; 7 November 1975, 2 BvL 13/75.

those mixed panels can be found in patent courts in Austria³⁸, Germany³⁹, Sweden⁴⁰, Switzerland⁴¹ and even the newly established Unified Patent Court⁴². Similarly, at the mixed civil-administrative Italian Higher Public Water Court (Tribunale Superiore delle Acque Pubbliche), which, inter alia, deals with damages actions resulting from the exploitation of water⁴³, technical judges sit on the panel with professional judges⁴⁴. These technical judges in either field are to be regarded as lay judges since they have not enjoyed a full legal education but have received a degree in a technical subject and, if necessary, further legal training.⁴⁵ In contrast to the above examples from labour or agricultural law, however, technical judges in some jurisdictions can also pursue this judicial activity full-time.⁴⁶ Their lay status follows solely from the fact that they have not had a full legal education but are technicians by training. Similar to the above examples, technical judges are involved in the adjudication because of their specialised knowledge; they should ensure the specialised expertise of the court for technical questions, which professional judges are not familiar with by virtue of their training, even if they have gained experiences in patent law.⁴⁷ Their involvement also results from the possibility of dispensing with a possibly costly expert opinion in view of the technical judge's own expertise.⁴⁸ Furthermore, as intellectual property law could also involve potentially difficult-to-quantify damages claims, the organisation of courts in intellectual property law in Sweden should be highlighted as another compelling example. In Sweden, next to a technical judge, an economic judge also sits on the panel to better assess the economic questions in intellectual property proceedings.⁴⁹

Due to their long-standing tradition of involving commercial lay judges, commercial courts, commercial chambers, or senates in civil courts in some European countries are particularly noteworthy.⁵⁰ They are especially relevant as commercial proceedings are on a general level comparable to private damages actions for competition law violations since both belong to the overall business law sector. Therefore, in some states, private competition law damages proceedings even

³⁸ § 146 Patent Act Austria (Patentgesetz).

³⁹ § 65 (2) Patent Act Germany (Patentgesetz).

⁴⁰ Chapter 2 § 1 Act on Patent and Market Courts Sweden (Lag om patent- och marknadsdomstolar).

⁴¹ Art. 8 Patent Court Act Switzerland (Patentgerichtsgesetz).

⁴² Art. 15 (1) Unified Patent Court Agreement.

⁴³ Art. 140 Royal Decree 1975 of 1933 (Consolidated Law on Public Waters) (Regio Decreto n° 1775 del 1933 (Testo Unico delle Acque Pubbliche)).

⁴⁴ Art. 142 Royal Decree 1975 of 1933 (Consolidated Law on Public Waters) (Regio Decreto n° 1775 del 1933 (Testo Unico delle Acque Pubbliche)).

⁴⁵ See Chapter 2 § 4 Act on Patent and Market Courts Sweden (Lag om patent- och marknadsdomstolar), Art. 15 (3) Unified Patent Court Agreement.

⁴⁶ See § 65 (3) Patent Act Germany (Patentgesetz).

⁴⁷ Karl-Heinz Leise, 'Das Selbstverständnis des Bundespatentgerichts unter besonderer Berücksichtigung des technischen Richters' [1981] GRUR 470 et seq.; Rudi Beyer, 'Bewährte Zusammenarbeit zwischen technischen Richtern und rechtskundigen Richtern auch bei einem zentralen europäischen Patentgericht' [2001] MittPatA 329 et seq.; Antje Sedemund-Treiber, 'Braucht ein europäisches Patentgericht den technischen Richter?' [2001] GRUR 1004 et seq.

⁴⁸ German Federal Court of Justice, 26 August 2014, X ZB 19/12.

⁴⁹ Chapter 2 §§ 1, 4 Act on Patent and Market Courts Sweden (Lag om patent- och marknadsdomstolar).

⁵⁰ Vito Piergiovanni (ed), *The Courts and the Development of Commercial Law* (Dunker & Humblot 1987); Alexander Brunner (ed), *Europäische Handelsgerichtsbarkeit* (Stämpfli Verlag 2009); Alexander Brunner and Isabelle Monferrini (eds), *Die Zukunft der Handelsgerichte in Europa* (Stämpfli Verlag 2019). There are states that foresee commercial courts without lay participation, such as the Netherlands, Quincy C Lobach, 'Netherlands Commercial Court – Englisch als Gerichtssprache in den Niederlanden' [2017] IWRZ 256 et seq.

fall within the jurisdiction of the commercial courts. Austria⁵¹, Belgium⁵², France⁵³, Germany⁵⁴ and Switzerland⁵⁵, for example, know the concept of commercial expert lay judges. These commercial judges are not legal professionals, but they come from different business community sectors.⁵⁶ They are usually honorary- or part-time judges appointed or elected for a specific period.⁵⁷ In some systems, they are paid like professional judges.⁵⁸ In others, they are unpaid but compensated for their efforts.⁵⁹ In most systems, they share the bench with professional judges in mixed courts.⁶⁰ In France, however, despite plans to introduce a system of mixed courts, the panels at commercial courts consist solely of lay judges.⁶¹ Instead, court clerks (*greffiers*) are also involved, especially in drafting the decisions, and they also assist commercial judges in legal matters.⁶² This stems back from the long French tradition of having commercial disputes solved solely by peers of the commercial community.⁶³ In addition to economic and commercial expertise, the legitimacy and communication function is cited as the main reason for involving only lay judges in the decision-making process.⁶⁴ In the other mixed-

⁵¹ §§ 7(2), (3), 15 – 18 Jurisdictional Rules Austria (Jurisdiktionsnorm), see Paul Oberhammer, ‘Österreichische Handelsgerichte’ in Brunner (n 50) 87 et seq.; Sonja Bydlinski and Maria Wittmann-Tiwald (eds), *300 Jahre staatliche Handelsgerichtsbarkeit* (NMW 2018); Georg Kathrein, ‘Grundlagen Österreich’ in Brunner/Monferrini (n 50) 45 et seq.; Karl-Heinz Krenn, ‘Der Beitrag der fachmännischen Laienrichter aus dem Handelsstand für die Handelsgerichtsbarkeit’ in Kohl/Reiter-Zatloukal (n 18) 431 et seq.

⁵² In Belgium, the commercial courts have recently been replaced by the so-called business courts. Nevertheless, the business courts also know the concept of lay judges from the business community, Artt. 85, 203 Judicial Code Belgium (Code judiciaire), see Paulette Vercauteren, ‘Pratique en Belgique’ in Brunner/Monferrini (n 50) 119 et seq..

⁵³ Artt. L721-1 – L724-7 Commercial Code France (Code du commerce); see Jean-Luc Vallens, ‘Les tribunaux de commerce en France’ in Brunner (n 50) 145 et seq.; Holger Fleischer and Nadja Danninger, ‘Handelsgerichte in Frankreich und Deutschland zwischen Tradition und Innovation’ [2017] RIW 549 et seq.; Nicole Stolowy and Matthieu Brochier, ‘France’s commercial courts: administration of justice by ordinary citizens’ [2017] JBL 1 et seq.; Yves Chaput, ‘Objectifs en France’ in Brunner/Monferrini (n 50) 93; Jean Bertrand Drummen, ‘Pratique en France’ in Brunner/Monferrini (n 50) 101 et seq.

⁵⁴ § 105 Judicature Act Germany (Gerichtsverfassungsgesetz), §§ 44 – 45a German Judiciary Act (Deutsches Richter Gesetz); see Ulrich Haas, ‘Deutsche Zivilkammern in Handelssachen’ in Brunner (n 50) 113 et seq.; Dieter Kunzler, ‘Deutsche Handelsgerichtsbarkeit – Praxis’ in Brunner (n 50) 133 et seq.; Klaus Lindloh, *Der Handelsrichter und sein Amt* (6th edn Vahlen 2012); Fleischer/Danninger (n 53) 549 et seq.; Holger Fleischer and Nadja Danninger, ‘Die Kammer für Handelssachen: Entwicklungslinien und Zukunftsperspektiven’ [2017] ZIP 205 et seq.; Nils Neumann and Hans-Gert Bovelett, ‘Zur KfH oder nicht? – Prozesslagen und Anwaltstaktik’ [2018] NJW 3498 et seq.; Rupprecht Podszun and Tristan Roher, ‘Die Zukunft der Kammer für Handelssachen’ [2019] NJW 131 et seq.; Eberhard Kramer, ‘Grundlagen Deutschland’ in Brunner/Monferrini (n 50) 67 et seq.; Dieter Kunzler, ‘Praxisvorschläge Deutschland’ in Brunner/Monferrini (n 50) 77 et seq.; Felix Fuchs, ‘Aktuelle Fragen und Rechtsprechung im Zusammenhang mit der Verweisung des Rechtsstreits von der Zivilkammer an die Kammer für Handelssachen’ [2020] GWR 280 et seq.

⁵⁵ Art. 6 Code of Civil Procedure Switzerland (Zivilprozessordnung), most prominently in Zurich §§ 38, 39 Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure Zurich (Gesetz über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess); see Peter Nobel, ‘Zur Institution der Handelsgerichte’ (1983) I ZSR 137 et seq.; Friedemann Vogel, ‘125 Jahre Züricher Handelsgericht’ (1922) 88 SJZ 17 et seq.; David Rüetschi, ‘Die Zukunft der Handelsgerichte’ (2005) 101 SJZ 29 et seq.; Alexander Brunner, ‘Handelsrichter als Vermittler zwischen Wirtschaft und Recht’, (2006) 102 SJZ 428 et seq.; Isaak Meier and Michael Rüegg, ‘Handelsgerichtsbarkeit in der Schweiz’ in Brunner (n 50) 33 et seq.; Thomas Klein, ‘Praxis an den Schweizer Handelsgerichten’ in Brunner (n 50) 75 et seq.; Alexander Brunner and Peter Nobel (eds), *Handelsgericht Zürich 1866-2016: Zuständigkeit, Verfahren und Entwicklungen* (Schulthess 2016); Christoph Leuenberger, ‘Grundlagen Schweiz’ in Brunner/Monferrini (n 50) 21 et seq.; Peter Nobel, ‘Praxisvorschläge Schweiz’ in Brunner/Monferrini (n 50) 33 et seq.

⁵⁶ See §§ 108, 109 Judicature Act Germany (Gerichtsverfassungsgesetz); Art. 203 Judicial Code Belgium (Code judiciaire), Art. 723-4 Commercial Code France (Code du commerce).

⁵⁷ See § 15(3) Jurisdictional Rules Austria (Jurisdiktionsnorm), § 108 Judicature Act Germany (Gerichtsverfassungsgesetz); Judicial Code Belgium (Code judiciaire); Art. 722-6 Commercial Code France (Code du commerce).

⁵⁸ See § 15(1) Jurisdictional Rules Austria (Jurisdiktionsnorm).

⁵⁹ See § 107 Judicature Act Germany (Gerichtsverfassungsgesetz); Art. L722-16 Commercial Code France (Code du commerce), see Brunner (n 55) 430.

⁶⁰ See § 7(2) Jurisdictional Rules Austria (Jurisdiktionsnorm); § 105 Judicature Act Germany (Gerichtsverfassungsgesetz); Art. 85 Judicial Code Belgium (Code judiciaire); § 39(2) Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure Zurich (Gesetz über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess).

⁶¹ See Artt. 721-1, 722-1 Commercial Code France (Code du commerce); exceptions exist for Alsace–Moselle, where instead of commercial courts, commercial chambers similar to the German system exist, which are mixed courts (Art. 731-3 Commercial Code France (Code du commerce)); and for the overseas departments, who also have mixed courts (Art. 732-3 Commercial Code France (Code du commerce)).

⁶² Fleischer/Danninger (n 53) 549, 555.

⁶³ See on the historical developments Étienne Regnard, *Les tribunaux de commerce et l’évolution du droit commercial* (Arprint 2007); Amalia D. Kessler, *A Revolution in Commerce: The Parisian Merchant Court and the Rise of Commercial Society in Eighteenth-Century France* (Yale University Press 2007); Fleischer/Danninger (n 53) 549, 550; Stolowy/Brochier (n 53) 2 – 11; Drummen (n 53) 103.

⁶⁴ Stolowy/Brochier (n 53) 12; Chaput, ‘Objectifs en France’ in Brunner/Monferrini (n 50) 96.

court systems, the focus lies solely on the expertise: the commercial lay judges should provide the bench with a better understanding of economic contexts and business practices.⁶⁵ Commercial lay judges are expected to assess a case based on their particular professional qualifications and business experience, allowing for a practical and appropriate judgment in commercial disputes.

In summary, expert lay judges are a well-known concept in civil justice in Europe. They are consistently used primarily because of their specific expertise.

2. Existent forms of lay participation in private enforcement of competition law

In private enforcement of competition law, expert lay judges have so far been the exception and can only be found in very few systems in Europe. In some States, private actions for competition law damages fall into the jurisdiction of the commercial courts, which entirely or partly consist of commercial lay judges. Notwithstanding, except for the Commercial Court of Zurich (Handelsgericht Zürich) with its special allocation mechanism, which considers the particular knowledge and focus of the judges, these systems also do not necessarily pay attention to any competition law expertise of the lay judges.

a. France

In France, the commercial courts generally have jurisdiction over any litigation between traders or companies concerning commercial acts,⁶⁶ which usually includes actions for damages for breaches of competition law.⁶⁷ Not all commercial courts have jurisdiction over cartel damages actions, as proceedings are concentrated in eight specific commercial courts.⁶⁸ Those courts should, in theory, be specialised, amongst other areas falling in their jurisdiction, in competition matters.⁶⁹ As mentioned above, the judges at the French commercial courts are entirely laypersons coming from the business community. However, neither the selection process of the commercial judges nor their further training pays any specific attention to their competition law expertise.

Nevertheless, at least at the larger commercial courts, above all in Paris, chambers are formed for particular areas of law.⁷⁰ For example, at the Paris Commercial Court (Tribunal de Commerce de Paris), a chamber for competition law exists.⁷¹ In this particular chamber, one can thus assume some expertise of the commercial judges in competition law and, since the commercial judges are members of the business community, also a certain economic expertise. Moreover, already in 2010, an English-speaking International Chamber was established at the Paris Commercial Court,⁷² which also lists competition damages actions in cases involving an international dimension amongst their

⁶⁵ The expertise is specifically mentioned in § 39(2) Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure Zurich (Gesetz über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess); see Lindloh (n 54) 60, 61; Fleischer/Danninger (n 54) 205, 207, 208; Stolowy/Brochier (n 53) 1, 20; Neumann/Bovelett (n 54) 3499; Podszun/Roher (n 54) 133; Leuenberger (n 55) 23; Krenn (n 51) 435.

⁶⁶ Art. L721-3 Commercial Code France (Code du commerce).

⁶⁷ For the rare actions of non-tradesperson against a tradesperson, the non-tradesperson can choose the commercial or civil court, Stolowy/Brochier (n 53) 15.

⁶⁸ Artt. L420-7, R-420-3, Annex 4-2 Commercial Code France (Code du commerce).

⁶⁹ Critical David Bosco, *La spécialisation judiciaire française en matière de concurrence dans l'impasse*, [2011] *Concurrences* 236 et seq.

⁷⁰ Stolowy/Brochier (n 53) 17; Fleischer/Danninger (n 53) 556.

⁷¹ Tribunal de Commerce de Paris, 'Chambre de Contentieux' (2022) <<https://www.tribunal-de-commerce-de-paris.fr/fr/chambres-de-contentieux>> accessed 09 May 2022.

⁷² See Bernard Auberger, 'La chambre internationale du Tribunal de Commerce de Paris' [2010] 10 *Juriste d'Entreprise Magazine* 61 et seq.; Christoph A Kern, 'English as a Court Language in Continental Courts' (2012) 5 *Erasmus L Rev* 187, 195; Giesela Rühl, 'Auf dem Weg zu einem europäischen Handelsgericht?' [2018] *JZ* 1073, 1076; Alexandre Biard, 'International Commercial Courts in France: Innovation without Revolution?' (2019) 12 *Erasmus L Rev* 24 et seq.

competencies⁷³. However, since other legal matters in international affairs also fall within its competence, it is not necessarily to be assumed that the commercial judges have special expertise in competition law and competition economics. Without specific figures for competition law actions being available, though, the success rate of French commercial courts is quite high. *Stolowy and Brochier* have shown that “the rate of appeals against decisions by commercial courts is lower than the rate of appeals against district court decisions”, and “the rate of commercial court rulings overturned on appeal is much lower than the rate for other courts of the first instance.”⁷⁴ At the same time, *Stolowy and Brochier* have shown that the duration of the procedure of commercial courts, with an average of 5 months per procedure in 2015, is much shorter than in ordinary civil courts.⁷⁵

b. Switzerland

In Switzerland, notably at the prominent Commercial Court in Zurich, competition law disputes, including private damages actions, fall into the jurisdiction of the commercial court.⁷⁶ There, a special emphasis is placed on the expertise of the commercial judges. In that respect, the allocation mechanism of commercial judges according to their individual expertise is particularly noteworthy,⁷⁷ which is also referred to as the so-called “pool solution”⁷⁸.

The Commercial Court Zurich is staffed with two professional and three commercial judges. This composition with a majority of commercial judges also underlines the focus on the economic expertise of the panel.⁷⁹ The commercial judges “are designated taking into account their expertise”.⁸⁰ In practice, the commercial judges are distributed among chambers according to their own industry affiliation and legal expertise.⁸¹ This includes a chamber for “competition and intellectual property law”.⁸² Within the chambers, the president of the higher court selects the most appropriate, knowledgeable, and competent three commercial judges from all commercial judges of this chamber by virtue of his authority to manage the court.⁸³ The Zurich Commercial Court particularly emphasises that they have commercial judges who are competition law experts.⁸⁴ However, no information is provided on the profession of these commercial judges, particularly, whether they are economists or not.

Generally, not specific to competition law, the Zurich Commercial Court is praised for its fast, relevant and cost-effective handling of cases, especially because expensive expert opinions can be avoided.⁸⁵ It is often taken as a model for a reorientation of courts, primarily commercial courts, in terms of specialisation.⁸⁶

⁷³ Tribunal de Commerce de Paris, ‘La Chambre Internationale: Les Domaines de Compétence’ (2022) <<https://www.tribunal-de-commerce-de-paris.fr/fr/domaines-de-competence-tribunal-de-commerce-de-paris>> accessed 09 May 2022.

⁷⁴ *Stolowy/Brochier* (n 53) 19.

⁷⁵ *ibid.*

⁷⁶ § 44 lit. a Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure Zurich (Gesetz über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess), Art. 5(1) lit. b Code of Civil Procedure Switzerland (Zivilprozessordnung).

⁷⁷ *Leuenberger* (n 55) 30, 31.

⁷⁸ *Fleischer/Danninger* (n 54) 208; *Podszun/Roher* (n 54) 133, 134.

⁷⁹ *Brunner* (n 55) 429.

⁸⁰ § 39(2) Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure Zurich (Gesetz über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess).

⁸¹ *Fleischer/Danninger* (n 54) 208; *Leuenberger* (n 55) 30, 31.

⁸² *Isabelle Monferrini* ‘Vergleichsverhandlungen vor dem Zürcher Handelsgericht, Beiträge aus den zehn Kammern des Handelgerichts’ in *Brunner/Nobel* (eds) (n 55) 134.

⁸³ § 77(1) GOG Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure Zurich (Gesetz über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess).

⁸⁴ *Zivil und Strafrechtspflege Zürich*, ‘Handelsgericht: Aufgaben’ (2022) <<https://www.gerichte-zh.ch/organisation/handelsgericht/aufgaben.html>> accessed 09 May 2022.

⁸⁵ *Brunner* (n 55) 429; *Leuenberger* (n 55) 23.

⁸⁶ *Fleischer/Danninger* (n 54) 208; *Podszun/Roher* (n 54) 133, 134.

c. Austria

The Austrian system yields a mixed picture. On the one hand, it generally follows a positive approach with regard to the inclusion of expert lay judges in general competition proceedings before the Austrian Cartel Court (Kartellgericht).⁸⁷ The expert lay judges must have a longer professional experience in the legal or economic field and a corresponding law, business or economics degree.⁸⁸ In theory, due to this expertise, they bring to the bench, these expert lay judges of the Austrian Cartel Court could certainly be used as a model for further application, as this paper will explore further below. However, in practice, it is not guaranteed that the expert lay judges at the Austrian Cartel Court actually have profound knowledge of competition law economics. Moreover, those expert lay judges are not involved in private damages actions for the violation of competition law. The ordinary civil courts and not the Austrian Cartel Court have jurisdiction over private damages actions.⁸⁹ In ordinary civil courts, lay judges do not belong to the judicial bench.

Only in exceptional cases will the Cartel Court, with its expert lay judges, become marginally involved in private enforcement of competition law. In principle, any undertaking or association of undertakings, which has a legal or economic interest in the decision, has a right of application to the Cartel Court under Section 36(4) No. 4 Austrian Competition Act (Kartellgesetz). Further, in case the anticompetitive conduct has already been seized, and there has been no other final decision of the Cartel Court regarding this infringement, the Cartel Court may, upon request, issue a declaratory decision of a violation of Austrian, not EU competition law,⁹⁰ insofar as there is a legitimate interest, for example, future damages actions.⁹¹ A decision of the Cartel Court has a binding effect on private actions for damages.⁹² Yet, the binding effect only encompasses the competition law violation, as the decision of the Cartel Court does not contain any calculations of damages.⁹³ Consequently, the expert lay judges at the Cartel Court involved in the declaratory decision cannot use their expertise to calculate damages for the violation of competition law.

In addition, under certain circumstances, the Commercial Court Vienna (Handelsgericht Wien) or the commercial senates of the regional courts may also have jurisdiction for private damage claims. Commercial expert lay judges sit on the panel with two professional judges at these courts. The Commercial Court Vienna and the commercial senates of the regional courts do not have jurisdiction for private damages actions for the violation of competition law under the Austrian Competition Act.^{94, 95} However, a competition law violation can also constitute an infringement of § 1 Austrian Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb) if the infringement is capable of giving the infringer an advantage in competition, which will regularly be the case.⁹⁶ Disputes concerning unfair competition fall in the jurisdiction of the Commercial Court Vienna and the commercial senates of the regional courts.⁹⁷ At least at the Commercial Court Vienna, the allocation

⁸⁷ §§ 59, 64 – 72 Competition Act Austria (Kartellgesetz), see Elfriede Solé and Anneliese Kodek and Sabine Völkl-Torggler, *Das Verfahren vor dem Kartellgericht* (2nd edn Verlag Österreich 2019) 11.

⁸⁸ § 66 Competition Act Austria (Kartellgesetz).

⁸⁹ Friedrich Ruffler and Robert A Steinwender, 'Allgemeines Wettbewerbsrecht' in Michael Holoubek and Michael Potacs (eds) *Öffentliches Wirtschaftsrecht* (4th edn Verlag Österreich 2019) 651, 686 – 688; Solé/Kodek/Völkl-Torggler (n 87) 36.

⁹⁰ Axel Reidlinger and Isabella Hartung, *Das neue Österreichische Kartellrecht* (4th edn Verlag Österreich 2019) 230; Ruffler/Steinwender (n 89) 711, 712; Norbert Gugerbauer, *Kartellgesetz und Wettbewerbsgesetz* (3rd edn Verlag Österreich 2017) 424.

⁹¹ §§ 28, 36(4) Competition Act Austria (Kartellgesetz).

⁹² § 37i(2) Competition Act Austria (Kartellgesetz); Gugerbauer (n 90) 527.

⁹³ „Declaration of the infringement“ in § 28(1) Competition Act Austria (Kartellgesetz).

⁹⁴ §§ 37a – 37m Competition Act Austria (Kartellgesetz).

⁹⁵ § 51 Jurisdictional Rules Austria (Jurisdiktionsnorm).

⁹⁶ Gugerbauer (n 90) 59; Ruffler/Steinwender (n 89) 688; Solé/Kodek/Völkl-Torggler (n 87) 36.

⁹⁷ § 51(2) No. 10 Jurisdictional Rules Austria (Jurisdiktionsnorm).

of the commercial expert judges follows a similar procedure like the one in Zurich.⁹⁸ Nevertheless, the competition expertise of the expert lay judges in commercial matters should not be overestimated, as the actions for unfair competition practices based on a competition law infringement only occupy a small space even in the law of unfair competition. Moreover, the jurisdictional fragmentation in competition matters does not necessarily contribute to an increased understanding of competition law on the bench.

d. Germany

In Germany there has been a negative trend. Private enforcement of competition law, including actions for damages, used to be a commercial matter.⁹⁹ In commercial matters, the claimant generally has the choice to have the case heard by a chamber of the usual civil division, consisting of three professional judges in the normal composition, or the chamber belonging to the commercial division.¹⁰⁰ In their usual composition, the commercial chambers include two lay judges next to one professional judge¹⁰¹, but there is also the possibility of excluding the lay judges and having the professional judge decide on her own¹⁰².

In the 8th amendment of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*), the Federal Government has succeeded in its demand to abolish the jurisdiction of the commercial chambers for competition law damages claims.¹⁰³ Actions for injunctive relief and the levying of benefits may still be transferred to the commercial chambers at the claimant's request.¹⁰⁴ The German Federal Government cited as reasons for this amendment that competition law damages actions are factually, economically and legally complex and should, therefore, be assigned to the collegiate panels of professional judges in general civil chambers instead of the commercial chambers, which are only staffed with one professional judge.¹⁰⁵ However, as we will see more in detail below, it is precisely the complicated economic damages calculation why private damages actions for the violation of competition law should be decided by mixed panels that include lay judges, economic experts, on the bench.

Nevertheless, the changes brought by the 8th amendment of the German Competition Act might not be based on a complete legislative misunderstanding of economic realities in cartel damages actions but result from the general problematic state of the German commercial chambers.¹⁰⁶ Case numbers are declining and the case allocation system is outdated.¹⁰⁷ Cases are randomly allocated to a commercial chamber to which the commercial judges belong, and there is no allocation according to the particular skills and specialised knowledge of the commercial judges, which is consequently lost.¹⁰⁸ Therefore, in practice, the mentioned possibility of having the case decided by the professional judge without the participation of the commercial lay judges is used in 90% of the cases.¹⁰⁹ Special

⁹⁸ Fleischer/ Danninger (n 54) 208.

⁹⁹ On the legislative changes Jürgen Keßler, 'Was lange währt, wird endlich gut? – Annotationen zur 8. GWB-Novelle' [2013] WRP 1116, 1121; Achim Gronemeyer and Dimitri Slobodenjuk, 'Die 8. GWB-Novelle – Ein Überblick' [2013] WRP 1279, 1284.

¹⁰⁰ §§ 96, 98 Judicature Act Germany (*Gerichtsverfassungsgesetz*).

¹⁰¹ § 105 Judicature Act Germany (*Gerichtsverfassungsgesetz*).

¹⁰² § 349(3) Code of Civil Procedure Germany (*Zivilprozessordnung*).

¹⁰³ BT-Drs. 17/9852, 54.

¹⁰⁴ § 95(2) No. 1 Judicature Act Germany (*Gerichtsverfassungsgesetz*).

¹⁰⁵ BT-Drs. 17/9852, 38.

¹⁰⁶ Graf-Peter Calliess and Hermann Hoffmann, 'Effektive Justizdienstleistungen für den globalen Handel' [2009] ZRP 1 et seq.; Christian Wolf, 'Zivilprozess versus außergerichtliche Konfliktlösung – Wandel der Streitkultur in Zahlen' [2015] NJW 1656, 1659; Gerhard Wagner, *Rechtsstandort Deutschland im Wettbewerb* (CH Beck 2017) 199 et seq.; Fleischer/Danninger (n 54) 207; Podszun/Roher (n 54) 132.

¹⁰⁷ Wagner (n 106) 202; Podszun/Roher (n 54) 132.

¹⁰⁸ Fleischer/ Danninger (n 54) 207.

¹⁰⁹ Fleischer/Danninger (n 53) 549, 553.

competition lay judges, for example, economists with special knowledge of cartel damages calculation, did not exist anyway. The change in the 8th amendment of the German Competition Act may, therefore, rather be a reaction to these grievances for private damages actions. The discussion of the involvement of lay judges in competition law could also be taken as an opportunity to rethink the function and organisation of the chambers for commercial matters in Germany.¹¹⁰

This section has shown that expert lay judges are not completely unknown in private damages actions for competition law violations. However, the existing areas of application still maintain several weaknesses, even though individual aspects certainly could have a model function.

III. Advantages and disadvantages of competition expert lay judges

While the previous part has illustrated that the expert lay judge is indeed a familiar concept in Europe, possibly one that could be expanded further, this section examines the theoretical and argumentative foundations and explores the advantages and disadvantages of involving expert lay judges in private competition law damages actions. At this point, the practical details of such involvement are not discussed in detail, but this paper proposes the use of competition economists as expert lay judges.

1. The advantages of cartel damages specific expertise and the accompanying consequences

The previous section has already demonstrated that the civil justice system mainly involves lay judges in the judicial decision-making process for their expertise. As mentioned above, lay labour, agricultural, technical and commercial judges are used because they provide the bench with specific expert knowledge that the professional judges do not possess or possess to a lesser degree. In the case of competition expert lay judges, too, it would be precisely and above all their economic expertise that could be an advantage and several positive implications for cartel damages actions.

First, the judicial expertise would make other expertise redundant. In addition to legally challenging questions, economic questions, especially the calculation of cartel damages and pass-on, are the main challenge in private damages litigation. As already mentioned, these calculations are often provided through outside expert evidence. Competition expert lay judges can decide based on their own expertise, making expert opinions obsolete. Generally, civil procedural law allows the court's own expertise to take the place of expert evidence. In German civil procedural law, for example, a request for expert evidence can be rejected on the grounds that the court itself has the necessary expertise.¹¹¹ At German commercial chambers, in particular, the court may, with the involvement of the expert lay judges, decide on the basis of its own expertise and knowledge, for the assessment of which a commercial appraisal by the lay judge is sufficient, without obtaining an expert opinion.¹¹² Only when the own expertise of the bench is not sufficient an external expert must be involved.¹¹³ Practice at the German Federal Patent Court pr at the agriculture or commercial chambers has shown that expert opinions can usually be avoided due to the involvement of technical judges.¹¹⁴

This reasoning is transposable to private damages actions for competition law violations. The professional judges themselves, albeit often having gained experience in competition matters, especially if they serve on competition-specific chambers, do not have any training in economics.

¹¹⁰ Generally, on the specialisation of courts and involvement of lay judges in German civil procedural law, Graf-Peter Calliess, 'Der Richter im Zivilprozess - Sind ZPO und GVG noch zeitgemäß?' [2014] NJW-Beil. 27, 29.

¹¹¹ See, for example, German Federal Court of Justice, 26 April 1989, Ivb ZR 48/88.

¹¹² § 114 Judicature Act Germany (Gerichtsverfassungsgesetz), see hereto Jürgen Blomeyer, 'Der Ruf nach dem spezialisierten und sachverständigen Richter' [1970] ZRP 153, 155; Fleischer/ Danninger (n 54) 2011; Neumann/Bovelett (n 54) 3499.

¹¹³ Similar reasoning for technical judges in patent courts and providing practical examples Stephan Neuhaus, 'Der Sachverständige im deutschen Patentverletzungsprozess' [1987] GRUR Int. 483, 484.

¹¹⁴ For technical judges in particular Beyer (n 47) 329, 329.

Yet, special economic expertise with econometric models is required when calculating cartel damages,¹¹⁵ which professional judges do not have. Even if economics classes should rightfully be included in the curriculum of law schools or further economical training is offered for judges to increase their economic competence,¹¹⁶ the acquired expertise would certainly not compare to those of an experienced competition economist. Accordingly, economic expertise on the bench can only be meaningfully exercised by competition expert lay judges.

Consequently, procedural efficiencies could be created. As mentioned above, both parties often provide differing expert opinions for the damages calculation in cartel damages claims, which makes a court-appointed expert necessary. This approach ramps up procedural costs and prolongs the procedures. The use of competition expert lay judges, on the other hand, would make expert evidence obsolete altogether and is therefore cost-effective and fast.¹¹⁷ In general, specialisation is usually considered a key factor for judicial efficiency from a legal economy view.¹¹⁸ The general economic expertise relevant in competition proceedings is increased by the competition expert lay judges, which can lead to further procedural efficiencies.¹¹⁹ The expert judge can educate the other bench members, the professional judges, on the respective economic matter so that the entire bench can accurately grasp the economic issues relevant to the decision within a reasonable time and effort.¹²⁰ It is reported that the expert lay judges at Austrian, French and Swiss commercial courts or the technical judges at patent courts, for example, generally use their practical expertise to provide accurate, timely and cost-saving information as well as orders to expedite and cheapen proceedings.¹²¹ As mentioned-above, the French commercial court proceedings, in particular, are much shorter than ordinary civil proceedings.

Like in commercial courts used today, expert lay judges in private damages actions for the violation of competition law could be sparring partners or a counterweight for the legally trained professional judges and bring a different, non-legal but a practically relevant and economical sound perspective into the proceedings.¹²² In addition, they can use their expertise to oppose and challenge the highly specialised competition lawyers and economists in a manner that a professional judge will not be able to due to her limited economic knowledge.¹²³ The expert judge thus also contributes, through her presence on the bench, to preventing possible communication problems between the professional judges and the parties with their highly specialised lawyers and economists.¹²⁴ Such management of the negotiations by the expert lay judges could then also improve court settlement negotiations and thus end cartel damages proceedings consensually.¹²⁵ This, in turn, saves time and resources and could lead to greater acceptance of the outcome by the parties. Figures from Swiss commercial courts

¹¹⁵ See European Commission (n 5).

¹¹⁶ Critically Fleischer/Danninger (n 54) 211.

¹¹⁷ See Jürgen Blomeyer, 'Der Ruf nach dem spezialisierten und sachverständigen Richter' [1970] ZRP 153, 155; similar reasoning for technical judges in patent courts Sedemund-Treiber (n 47) 1004, 1009; for German commercial judges, Neumann/Bovelett (n 54) 3498, 3499.

¹¹⁸ Lawrence Baum, *Specializing the Courts* (University of Chicago Press 2011); Stefan Voigt, 'Determinants of judicial efficiency: a survey' (2016) 42 Eur J Law Econ 183, 191; Podszun/Roher (n 54) 133; general discussion Holger Fleischer, 'Spezialisierte Gerichte: Eine Einführung' [2017] RabelsZ 497 et seq.

¹¹⁹ See Fleischer/ Danninger (n 54) 207.

¹²⁰ Generally Machura (n 16) 235, 240; similar reasoning for technical judges in patent courts Sedemund-Treiber (n 47) 1004, 1008; for commercial courts Fleischer/ Danninger (n 54) 211.

¹²¹ Brunner (n 55) 429; Stolowy/Brochier (n 53) 15, 18; Krenn (n 51) 431, 434; Leuenberger (n 55) 23; Sedemund-Treiber (n 47) 1004, 1008.

¹²² Machura (n 16) 235, 239; Podszun/Roher (n 54) 133.

¹²³ Michael Lotz, 'Qualitätssicherung im Zivilprozess' [2014] DRiZ 20 et seq.; Martin Zwickel, 'Interdisziplinär besetzte Richterbank als Chance für größere Bürgernähe' [2014] DRiZ 258, 259; similar reasoning for technical judges in patent courts Beyer (n 47) 329, 330; similar for lay judges at commercial courts Lindloh (n 54) 63.

¹²⁴ Similar reasoning for technical judges in patent courts Sedemund-Treiber (n 47) 1004, 1008.

¹²⁵ Similar reasoning for commercial proceedings Stolowy/Brochier (n 53) 15, 16; Podszun/Roher (n 54), 'Die Zukunft der Kammer für Handelssachen' [2019] NJW 131, 133; Krenn (n 51) 431, 434.

have shown that the involvement of expert lay judges resulted in a settlement rate of around 70% in the first instance.¹²⁶

In general, the expertise provided by the lay judges on the judicial bench can lead to a more relevant, pragmatic, practical-oriented and innovative damages calculation and overall decision in competition law damages proceedings.¹²⁷ This can also lead to a higher acceptance of the decision by the parties and the public.¹²⁸ Where expert judges are already used, for example, in the commercial courts in France and Zurich, the decisions enjoy a high level of acceptance by the parties, which the low appeal rates demonstrate, and, in general, a high reputation.¹²⁹ In this context, the democratic participation function through the involvement of such lay judges, often peers from a similar industry field as the parties, should also be mentioned.¹³⁰ From a rule of law perspective, the participation of such expert lay judges is also to be assessed positively. An expert decision certainly fulfils the expectations of the parties. The provided expertise and accompanying specialisation also ensure a certain quality of jurisprudence.¹³¹ As an imperative of the rule of law, it is the task of the judiciary to resolve legal disputes with the necessary expertise and guarantee effective judicial protection.¹³²

The fact that expert lay judges are already used in other areas of law in many European states shows that in those states, the legislator has already made a fundamental decision in favour of the participation of expert lay judges in their legal systems.¹³³ In other states where the concept of (expert) lay judges does not exist, the existent models of other states can serve an exemplary comparative function. This exemplary function applies especially to the existing systems that already provide for competition expert lay judges. The fact that expert lay judges are already used in many areas of civil justice would also not lead to an unjustified privilege for private enforcement of competition law. Moreover, the introduction of competition expert lay judges goes hand in hand with the general, Europe-wide development and the introduction of specific commercial courts for international commercial disputes¹³⁴ and could fulfil a crucial complementary function.

2. Dispensing and mitigating concerns

Conversely, there are also disadvantages brought forward against the participation of expert lay judges, which, in theory, can be transposed to private enforcement of competition law. However, on closer examination, these do not prove to be valid as long as the procedural rules are adapted accordingly.

As mentioned above, private damages actions usually involve not only complex economic calculations but also legal questions. Lay judges are not trained to solve those legal questions; a professional judge is superior in this aspect. The fact that lay judges have no legal training is, as mentioned above, also the reason why in Germany, competition law damages actions no longer fall

¹²⁶ Brunner (n 55) 431; Roland O Schmid 'Vergleichsverhandlungen vor dem Zürcher Handelsgericht, Beiträge aus den zehn Kammern des Handelsgericht' in Brunner/Nobel (n 82) 235 et seq.; Leuenberger (n 55) 24.

¹²⁷ Similar for lay judges in commercial proceedings Lindloh (n 54) 60 et seq.; Fleischer/ Danninger (n 54) 213.

¹²⁸ See Zwickel (n 123) 258 et seq.; Olga Stürzenbecher-Vouk, 'Der den Gerichten beigegebene Sachverstand' [2016] ZVG 626, 627; Krenn (n 51) 431, 433, 435; providing empirical research on the issue of lay judges and their acceptance in general Stefan Voigt, 'The effects of lay participation in courts — A cross-country analysis' (2009) 25 Eur J Polit Econ 327 et seq.

¹²⁹ Stolowy/Brochier (n 53) 433.

¹³⁰ See Zwickel (n 123) 258 et seq.; Stürzenbecher-Vouk (n 128) 239.

¹³¹ Baum (n 118) 213.

¹³² Similar reasoning for commercial courts Podszun/Roher (n 54) 131; in the context of special information technology courts Rupprecht Podszun, QualityLaw: Zuständigkeitskonzentration für IT-Recht, [2022] MMR 249.

¹³³ See Fleischer/Danninger (n 54) 211.

¹³⁴ See Rühl (n 72) 1073 et seq.; Biard (n 72) 24 et seq.; Burkhard Hess and Timon Boerner, 'Chambers for International Commercial Disputes in Germany: The State of Affairs' (2019) 12 Erasmus L Rev 33 et seq.; Erik Peetermanns and Philippe Lambrecht, 'The Brussels International Business Court: Initial Overview and Analysis' (2019) 12 Erasmus L Rev 42 et seq.

into the jurisdiction of the commercial chambers and why there has been a general decline of proceedings at those commercial chambers. However, such concerns can be addressed by appointing expert lay judges in mixed courts and, if necessary, even exceeding them in number by professional judges on the respective panel. Sound legal competence can be established by the professional judge and practical, economic competence by the expert lay judge.¹³⁵ Furthermore, mandatory trainings could be introduced for expert lay judges, which would provide them with the basic knowledge of competition law and civil procedure. A basic understanding acquired through practice and cooperation with lawyers is presumably already present among competition economists.

In addition, the competition economic expertise of the expert lay judges would actually have to be effectively assured.¹³⁶ As mentioned above, the German commercial chambers, for example, were criticised for not assigning commercial judges to cases according to their expertise and industry-specific knowledge. Any such criticism could be avoided for competition expert judges through appropriate allocation rules, for example, akin to the Zurich Commercial Court model, and further procedural guidelines. Naturally, such highly specialised lay judges are less flexibly usable for a large variety of cases. However, this specialisation is precisely the advantage of involving expert lay judges. In a similar vein, there are concerns that lay judges may not be able to prevail over dominant professional judges.¹³⁷ As a result, their expertise would be lost. However, with the appropriate training of the professional judges on a mixed panel and an appropriately balanced composition regarding the number of lay judges and professional judges, such concerns can also be mitigated.

Their expertise and industry knowledge are also sometimes negatively held against expert lay judges. Above all, there have been concerns about bias and capture and a lack of impartiality and judicial independence of lay judges conflicting with Article 6(1) European Convention of Human Rights (ECHR).¹³⁸ Nevertheless, also this concern can be mitigated as the normal conflicts of interest rules also apply to lay judges, as they do to professional judges.¹³⁹ This enables a lay judge who is too close to a certain industry to be excluded, if necessary.¹⁴⁰ Nevertheless, here, too, a balanced approach should be chosen since the industry knowledge qualifies a lay judge for her position. Furthermore, it is also not sufficient in the sense of Art. 6(1) ECtHR that there is abstract or structural proximity of the lay judges to a party or to a certain subject matter of the proceedings because concrete conflicts between the subject matter of the dispute and the interest of the lay judges are necessary for a violation of Art. 6(1) ECtHR.¹⁴¹ Incidentally, a mixed court with a balance between professional and lay judges can also be helpful in the sense that the professional judges can then devalue existing biases in an argumentative exchange with the lay judges.

Lastly, the use of expert lay judges for cartel damages actions is, of course, not the all-encompassing and only solution that will eliminate the mentioned problems existent in private enforcement of competition law, especially the calculation of cartel damages. Nevertheless, it is a first step in the right direction, necessarily together with other procedural means, such as the concentration of proceedings and specialisation of courts, to make private enforcement of competition law more effective.

¹³⁵ See Krenn (n 51) 431, 435; Leuenberger (n 55) 24.

¹³⁶ See Wolf (n 106) 1659; Fleischer/Danninger (n 54) 208.

¹³⁷ Similar reasoning for technical judges in patent courts Leise (n 47) 470, 474.

¹³⁸ Markus B Zimmer, 'Overview of Specialized Courts' [2009] *International Journal For Court Administration* 1, 4; Bernd Hirtz, 'Die Zukunft des Zivilprozesses' [2014] *NJW* 2529, 2531, early discussions Fritz Baur, 'Laienrichter – heute?' in Otto Bachof (ed) *Tübinger Festschrift für Eduard Kern* (Mohr Siebeck 1968), 49, 53 et seq.

¹³⁹ For example, § 42 Code of Civil Procedure Germany (Zivilprozessordnung).

¹⁴⁰ On such rules in French commercial proceedings Stolowy/Brochier (n 53) 13, in Swiss commercial proceedings, Brunner (n 55) 430.

¹⁴¹ European Court of Human Rights, 22 June 1989, *Langborger v. Sweden*, Application no. 11179/84; 26 October 2004, *Kellermann v. Sweden*, Application no 41579/98.

IV. A possible way forward

Following the advantages of the use of expert lay judges in cartel law presented here, the question of the structure and organisation of such a concept arises. The paper makes some general but brief suggestions in the following based on the models and examples provided above. However, the exact organisation of the introduction of lay judges for private enforcement of competition law will depend – outside of possible European Union harmonisation efforts with a revised Damages Directive¹⁴² – on the civil procedural rules of the different states. Hence, only a broad overview and general concepts can be given here.

The systematic and legal policy results found here support the introduction of expert lay judges in cartel damages law. Their introduction should also be accompanied by an overall court specialisation and supposedly a local concentration, similar to the French concentration provisions for competition damages actions.¹⁴³ Otherwise, competition expert lay judges would have to be appointed at each civil court, which in principle, have jurisdiction to decide on cartel damages action. This would entail an increased organisational effort. Any specialisation and concentration can be implemented, for example, through special competition law chambers at specific civil courts, where competition damages action will be concentrated or special courts for competition law, such as the British Competition Appeal Tribunal¹⁴⁴. However, the exact form of such specialisation is beyond the scope of this paper.

In order to achieve the discussed balance between legal and economic expertise, mixed courts like in the majority of commercial courts or chambers are preferable. Expert lay judges and professional judges should share the bench. To ensure a decision-making function and capability, an unequal number of judges is appropriate. Professional judges should predominate to perform the genuine judicial function, to counter the above-mentioned criticism of the lack of the expert judge's legal knowledge and to be able to satisfactorily solve the difficult legal questions arising in competition damages law. Nevertheless, further legal training should also be mandatory for the expert lay judges, as it is usual for French commercial judges at the French commercial courts.¹⁴⁵

Furthermore, the overarching question arises, what kind of lay judges would generally be appropriate for private damages actions. As mentioned throughout this paper, difficulties in private damages actions arise specifically with regard to damages calculation. As this is nowadays usually provided by economic experts, economists are suitable candidates for the position of expert lay judges in competition law, thus, providing the expertise as part of the panel and not as a party- or court-appointed expert. The general legal requirements can be based on those of commercial judges, i.e. a

¹⁴² Article 20(1) Damages Directive foresaw a review of the Directive and its implementation by 27 December 2020. Article 20(3) particularly provides that, if appropriate, the report should be accompanied by a legislative proposal. On 14 December 2020, the Commission published a report and came to an overall positive conclusion, see European Commission, 'Commission Staff Working Document on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (14 December 2020)' 14 <https://ec.europa.eu/competition/antitrust/actionsdamages/report_on_damages_directive_implementation.pdf> accessed 09 May 2022. Due to the considerable backlog of most Member States transpositions, the report does not contain the envisaged in-depth analysis of the Directive or a legislative proposal. However, this might follow in the future.

¹⁴³ See Fleischer (n 118) 497 et seq.

¹⁴⁴ On their involvement in private enforcement of competition law Anthony Maton, Simon Latham, Marc Kuijper and Timo Angerbauer, 'Update on the Effectiveness of National Fora in Europe for the Practice of Antitrust Litigation' JECLAP 3 (2012) 586, 591; Tom De La Mare, 'Private Actions in the Competition Appeal Tribunal: The Consumer Rights Act Giveth and the 2015 Competition Appeal Tribunal Rules Taketh away' (2015) 14 *Competition LJ* 219 et seq.; David George, 'Reforms to Private Actions in the Competition Appeal Tribunal - Taking Stock One Year on' (2016) 15 *Competition LJ* 225 et seq.

¹⁴⁵ Stology/Brochier (n 53) 10, 11.

certain minimum age and a certain minimum period of practical economic experience.¹⁴⁶ The right of nomination and the election or appointment of lay judges must also be regulated accordingly. Expert lay judges should be appointed for a specific period of time, with the possibility of renewal, similar to the provisions for commercial courts of chambers in Europe.

Turning to the issue of how the expertise on the part of the lay judges can be as targeted as possible and, thus, most precise and appropriate for the specific dispute at hand. In order to ensure that the expert lay judges' special sectoral knowledge and knowledge of certain industries are respectively adequately covered and assigned to the cases, the mentioned pool solution from the Zurich Commercial Court, which has been generally proposed for commercial disputes¹⁴⁷ would also be suitable for private damages actions for the violation of competition law. Accordingly, the appropriate lay judges for the case are appointed by the president from a pool of expert lay judges available to the court at the commencement of the proceedings.

Finally, certain procedural rules should also be introduced, or existing rules for other kinds of lay judges or judges, in general, should be applied to competition expert lay judges in order to ensure the proper administration of justice in accordance with the rule of law. This includes, for example, rules on confidentiality or conflicts of interest. At the same time, the above-mentioned concerns of impartiality and judicial bias of the expert lay judges would be mitigated.

V. Conclusion

This paper has shown that from a systematic and legal policy view, the introduction of competition expert lay judges can advance the understanding of the economic realities of cartel damages calculation of the judiciary and thus lead to an improved damages calculation and overall procedural efficiencies. The economic expertise of competition expert lay judges serves as their main advantage. The expertise available on the bench through the expert judge can save costs and time and can lead to economically sound and thus substantive relevant administration of justice, a genuine task of the judiciary. Any concerns and disadvantages can usually be mitigated through the use of procedural rules.

Existent forms of expert lay judges in Europe, most notably commercial judges, and the positive examples of the already existing concept of expert lay judges for competition law generally underline those findings and can be used as models for further advancement of the concept. The comparative analysis has shown that the use of expert lay judges nowadays is the absolute exception in private enforcement of competition law and that systems such as Germany, which has abolished expert lay judges for private damages actions need improvement. The use of expert lay judges, especially at commercial courts in France and Zurich, or the examples of technical judges at patent courts have illustrated the successful use of lay judges, which can, in principle, be transferred to private enforcement of competition law. The high settlement and low appeal rates show that decisions involving expert lay judges are accepted by the parties and generally improve the administration of justice.

The exact implementation of the concept could only be outlined here. This paper suggested the introduction of competition expert lay judges, notably competition economists with a specific acquired and recognised expertise, in mixed courts, where the respective allocation mechanism should allow an allocation according to industry knowledge. In order to ensure EU-wide harmonised

¹⁴⁶ See, for example, § 109 Judicature Act Germany (Gerichtsverfassungsgesetz).

¹⁴⁷ Fleischer/Danninger (n 54) 208; Podszun/Roher (n 54) 133, 134.

(minimum) standards, the basic concept for competition expert lay judges raised here could be taken up in a revision of the Damages Directive and supplemented by further refinements.

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